COURT No.2

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Central Excise Appeal No. 1 of 2005

Commissioner of Central Excise,
Merrut-I .....Appellant/Applicant

Versus

M/s Deshrekshak Aushadhalaya Ltd.
Haridwar .....Respondents

Dated: 5th September, 2007

Sri Arvind Vashist, learned Assistant S.G. for the Department/appellant.
Sri Pankaj Miglani, learned counsel for the respondent

Coram: Hon'ble P.C. verma, J.
Hon'ble M.M. Ghildiyal, J.

This appeal under Section 35-G of the Central Excise Act has been field against the order dated 14.9.2004 Passed by the Vice-President, Customs, Excise & Service Tax Appellate Tribunal passed in appeal no. E/2088/04 NB-S, whereby the Tribunal has dismissed the appeal. The Appeal was filed against the order passed by the Commissioner (Appeals) in appeal no. 44-CE/MRT-1/2004 dated 6.2.2004, whereby the Commissioner (Appeals) reduced the penalty imposed under Section 11-AC of the Central Excise Act to Rs. 5000/- from Rs. 42,193/-, which has been affirmed by the Vice-President, Customs, Excise & Service Tax Appellate Tribunal by dismissing t he appeal of the Revenue.

prospective in operation and the illegality committed prior to insertion of Section 11AC in the Act, can not be the subject matter of penalty under the said provision. In view of the said ratio, I find that the penalty under Section 11AC is imposable of the amount of duty short paid only after the Insertion of Section 11AC i.e. 28.9.96 and interest under Sec. 11AB is also imposable from this date. The Hon'ble Tribunal in the case of Escorts JCB Ltd. Vs. CCE New Delhi 2000(118)ELT650(TRI) has held that limit fixed under Section 11AC is the maximum limit and it is not mandatory that in all cases such maximum penalty should be imposed. Authority is having discretion to impose lesser penalty."

3. From the perusal of the aforesaid reasoning, it is no doubt the ratio have been correctly mentioned of the judgment by the Hon'ble Supreme Court in CCE, Coimbatore Vs. ELGI Equipments, but no finding has been recorded by the Tribunal whether the duty was detected after 28.9.1996 or not. Since the Commissioner (Appeals) failed to notice that the duty related to the financial year 1997-98 which clearly shows that duty was liable to be paid in the financial year 1997-98 which falls after 28.9.1996. Therefore, in view of the law laid down by the Hon'ble Apex Court as noticed by the Commissioner (Appeals), the penalty was liable to be imposed according to Section 11-AC.

the course of personal hearing the appellant has not pressed the issue of leviability of duty. Since the levy of duty was not disputed, therefore, in view of the mandatory provision contained under Section 11-AC, the penalty has to be equal to that of duty levied. Our view is fortified by the decision of the Hon'ble Allahabad High Court in *Pee Aar Steels (P) LTd. v. CCE,* Meerut reported in **2004 (170) E.L.T. 406 (Allahabad),** whereby it has been held that provision is mandatory and the penalty had to be paid equal to that of outstanding duty. The provisos attached to Section 11-AC are not attracted in the present case. Therefore, we set aside the order of the Customs, Excise & Service Tax Appellate Tribunal as well as the Commissioner (Appeals) and affirm the order passed by the Additional Commissioner, Central Excise, Ghaziabad. The question is answered accordingly in favour of the Revenue and against the assessee.

(M.M. Ghildiyal, J) **(P.C. Verma, J.)**

05.09.2007 05.09.2007

Prabodh